IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN E. WELCH	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITRANS INC., et al.	:	NO. 00-2606
	:	

O'NEILL, J. JANUARY , 2001

MEMORANDUM

Plaintiff Steven E. Welch was formerly employed as an executive at Maritrans Inc. Following his departure Welch did not receive severance compensation and brought suit against defendants Maritrans, Inc., Maritrans General Partner, Inc., and the CEO of Maritrans, Steven Van Dyck. Plaintiff's amended complaint contains seven counts and includes common law claims for constructive discharge and breach of contract as well as multiple claims under the federal Employee Retirement Income and Security Act of 1974, 29 U.S.C. § 1001 et seq., and a claim of retaliation in violation of plaintiff's rights under the federal Age Discrimination in Employment Act, 29 U.S.C. § 626. Presently before me is defendants' motion pursuant to Rule 12(b)(6) to dismiss all counts of the amended complaint.

BACKGROUND [1]

Until March, 2000 plaintiff was a Vice President of Maritrans, Inc. and a member of its "Business Leaders Team" earning a salary of $195,000 per year. As an executive officer Welch was party to a severance and non-competition agreement dated July 7, 1997, entitling him to receive severance benefits upon termination of his employment without cause ("1997 Plan"). In

[1] This section summarizes the allegations of the amended complaint.

the spring of 1999 Maritrans decided to relocate its principal place of business from Philadelphia to Tampa, Florida, although certain personnel were to remain in Philadelphia. Employees who did not wish to relocate were offered a standard severance package ("Standard Plan"). According to defendants, an employee was required to notify Maritrans of his acceptance of the offer by September 22, 1999.

Sometime in mid-February, 2000 Welch had a conversation with Janice Smallacombe, a senior Vice President at Maritrans. Welch asserts that Smallacombe suggested there might be a position available that would allow Welch to remain in Philadelphia. Later that month Welch attended a meeting where he received a favorable performance evaluation from the board of directors and other senior management. Smallacombe and Van Dyck were present at the meeting during which Welch claims Smallacombe offered him a choice of two positions: (1) remain as Vice President and Business Leader at his present salary and relocate to Tampa; or (2) remain in Philadelphia at a salary of $160,000 as Vice President and give up his position as a Business Leader. Welch states that on March 17, 2000 he had a telephone conversation with Smallacombe concerning these two offers during which he orally accepted the offer to remain in Philadelphia. Welch also states that he offered to waive his entitlement to relocation costs in exchange for continuing his salary at $195,000. Welch asserts that Smallacombe stated that they had a "handshake agreement." [2] On or about March 21, 2000 Welch received a written offer extending his employment in Philadelphia at a salary of $195,000 until March 31, 2001, that included an agreement to waive any claim to expenses should he decide thereafter to relocate. However,

[2] It is not clear from the amended complaint if the "handshake agreement" is meant to refer to the increase in pay or the offer to remain in Philadelphia in general or both.

Welch received e-mails from Smallacombe on March 21, and 22, 2000 asking him not to sign the document as she had been advised by Van Dyck that she did not have the authority to make any decision regarding Welch's employment contract.

On March 24, 2000 Van Dyck sent an e-mail to Welch explaining that due to Welch's poor performance on two recent projects Van Dyck considered him "not trustworthy." As a result Welch would no longer be considered a Business Leader and would be required to relocate to Tampa where his "activities could be closely monitored." Welch was also informed that his title would now be "senior market analyst" with a salary of $150,000. Welch alleges that he also received a phone call from Van Dyck on March 24 wherein Van Dyck inferred that if Welch did not accept his new employment arrangement Van Dyck would expose potentially damaging and/or embarrassing information concerning Welch.

In the weeks following March 24, 2000 the parties worked to reach an agreement concerning Welch's continued employment with Maritrans or a suitable severance package. On April 7, 2000 Van Dyck sent another e-mail to Welch indicating that he must either move to Tampa or resign. In that e-mail Van Dyck offered Welch the Standard Plan of $105,000, six months COBRA,[3] and outplacement assistance. Welch asserts that prior to April 7, 2000 he had never been offered severance under the Standard Plan. On or about April 25, 2000 Smallacombe sent Welch draft documents representing the severance offer made by Maritrans on April 7. The documents contained a waiver and release as to any legal claims Welch might have against Maritrans including any arising under federal age discrimination laws. The release stated that

[3] The Consolidated Omnibus Reconciliation Act ("COBRA") provisions of ERISA concern continuing health care coverage following an employee's departure.

Welch had twenty-one days to consult with counsel. On April 26, 2000 [4] counsel for plaintiff sent a letter via e-mail to Van Dyck seeking to clarify certain aspects of the severance agreement and asserting Welch's right to review the offer for twenty-one days. Welch alleges that he received a telephone call from Van Dyck shortly thereafter demanding that the letter from plaintiff's counsel "be withdrawn" or there would be no further discussions with Welch concerning his severance, and informing Welch that his salary would be reduced immediately. At approximately 4:45 p.m. on April 27, 2000 Walter Bromfeld, the company comptroller, came to Welch's office, relieved him of all company property including his building pass and company laptop computer, and escorted Welch from the building. The following day, April 28, Welch received a letter from Van Dyck ordering him to report back to work on Monday, April 30 to work on a particular project. The letter also stated that Maritrans did not intend to provide Welch with severance benefits.

On April 30, 2000 Welch went to Maritrans' Philadelphia office. He alleges that his computer password had been changed, that he was denied access to all his working files, and that the company laptop that had been assigned to him had not been returned. After requesting the return of the computer to prepare for a meeting the following day, at approximately 4:00 p.m. he received a laptop that did not include any of his personal or working files.

On May 8, 2000 Welch made a written request for severance payment under the terms of the 1997 Plan. This request was denied. On May 22, 2000 plaintiff filed this action to enforce

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[4] Welch's amended complaint states this letter was sent April 27, (Pl.'s Am. Comp. at ¶ 27); however the letter is dated April 26 and a number of plaintiff's subsequent filings assert the e-mail was sent on April 26, see e.g., (Pl.'s Opp. to Def.'s Mot. to Dism. at 5). The discrepancy is not relevant to the issues before me and for purposes of this memorandum I will assume the letter was sent on April 26.

the severance agreement (Count I); [5] for constructive discharge (Count II); for breach of employment contract (Count III); to recover benefits under ERISA 29 U.S.C. § 1132 (Count IV); for interference with protected rights under ERISA U.S.C. § 1140 (Count V); and for retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 626 (Count VI). [6]

STANDARD OF REVIEW

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding the motion I must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the [non-moving party]." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). A claim may be dismissed on 12(b)(6) grounds only if the plaintiff cannot demonstrate any set of facts in support of the claim that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In order to survive a 12(b)(6) motion, the plaintiff must make sufficient allegations to support his claim, but does not need to demonstrate that he will ultimately prevail on the merits. Id.

DISCUSSION

A. Count I - Suit to Enforce 1997 Plan

[5] Welch asserts that he is entitled to severance under the 1997 Plan; however, should it be found he is not entitled to recover under this plan he maintains he is at least entitled to severance benefits under the Standard Plan.

[6] Plaintiff filed his retaliation claim with the Equal Employment Opportunity Commission on June 2, 2000. An amended complaint including the retaliation claim was filed in this case on October 5, 2000.

Welch's first count demands payment under the 1997 Plan on the basis that he was involuntarily terminated and is therefore owed severance. [7] Defendants move to dismiss on two grounds: (1) section 514(a) of ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan"; and (2) even if this claim is not preempted it fails to state a claim for breach of contract since Welch "does not allege, nor could he allege truthfully that he was fired by Maritrans." (Def.'s Mot. to Dism. at 6). Defendant also requests that the claims in Count I be dismissed against Maritrans Inc. and Van Dyck because they were not parties to the 1997 Plan.

In response to defendants' argument that Count I is preempted by section 514(a) of ERISA, Welch states that his claims is not grounded in state law but is a claim under ERISA § 1132(a)(1)(B) to recover benefits or enforce his rights under the 1997 Plan. (Pl.'s Opp. to Def.'s Mot. to Dism. at 5). However, as defendants point out in reply, Count IV of plaintiff's amended complaint sets forth a claim under section 1132 of ERISA for recovery of benefits denied under the 1997 Plan. Plaintiff responds only by stating "[i]n view of the allegations that must be viewed in the light most favorable to the [p]laintiff, he states a valid claim for payment under the 1997 Severance Agreement as a result of his termination. Counts I and [IV] should therefore stand as stated. . . ." (Pl.'s Sur-Rep. to Def.'s Mot. to Dism. at 1). Given plaintiff's characterization of Count I as a claim under section 1132 of ERISA it is wholly encompassed by plaintiff's claims in Count IV and will therefore be dismissed. I need not consider defendants' other objections to Count I.

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[7] Under the 1997 Plan an employee is entitled to severance compensation "[i]n the event of the [e]mployee's involuntary termination of [e]mployment for reason[s] other than [c]ause." Severance and Non-Competition Agreement, dated July 7, 1997.

B. Count II - Constructive Discharge

Plaintiff's second count alleges that Maritrans "knowingly permitted conditions and circumstances in Welch's employment to become so intolerable as to constitute discharge." (Pl.'s Comp. at ¶ 43). Such a discharge, according to plaintiff, constituted an involuntary termination and therefore entitles him to full payment under the terms of the 1997 Plan. In response, defendants correctly point out that under Pennsylvania law ordinarily "there is no common law cause of action against an employer for termination of an at-will employment relationship," except "where the discharge of an at-will employee would threaten the mandates of public policy." Kroen v. Bedway Security Agency, 633 A.2d 628, 632 (Pa. Super. 1993)(citations omitted). Plaintiff maintains, however, that his claim falls within the exception stating, "[s]urely it is a violation of public policy to terminate an employee as a result of his assertion of age discrimination claims." (Pl.'s Opp. to Def.'s Mot. to Dism. at 6). Even if plaintiff is correct in this assertion, defendants argue the claim should be dismissed because it is preempted by the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 951 et seq. (2000).

In Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989), the Pennsylvania Supreme Court stated that "the PHRA provides a statutory remedy that precludes assertion of a common law tort action for wrongful discharge based upon discrimination." The Clay Court reasoned that the use of the word "shall" by the Pennsylvania legislature in the sentence "[t]he opportunity for an individual to obtain employement. . .without discrimination. . . shall be enforceable as set forth in this act," 42 Pa. Cons. Stat. § 953, "as opposed to 'may,' expresses an intent to make administrative procedures under the PHRA a mandatory rather than discretionary means of enforcing the right[s] created thereby." 559 A.2d at 917. Under Clay

Welch may not pursue a common law claim of constructive discharge based on allegations of employment discrimination. This does not, however, preclude plaintiff from pursuing such a claim under ERISA.

In Count II, Welch asserts that even though he may never have explicitly been told "you're fired" his working conditions became so intolerable that he was involuntarily terminated and thus is entitled to full payment under the 1997 Plan. Both parties agree that Maritrans' severance packages constitute "employee welfare benefit plans" governed by section 3(1) of ERISA, 29 U.S.C. § 1001(1). (Def. Mot to Dism. at 4-5; Pl.'s Opp. to Def.'s Mot. to Dism. at 5). The questions before me then are: (1) does the ERISA statute permit claims for constructive discharge; and (2) construing the facts in the light most favorable to the plaintiff has he stated a claim upon which relief may be granted.

In Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 176-77 (3d Cir. 1997), the Court of Appeals upheld the decision of the lower court, which recognized that constructive discharge claims are cognizable under section 510 of ERISA [8] and "are governed by an 'objective standard' which asks whether the employer 'creat[ed] conditions so intolerable that a reasonable person would resign.'" Id. (quoting Berger v. Edgewater Steel Co., 911 F.2d 911, 923 (3d Cir. 1987). Plaintiffs also have been allowed to proceed with a claim of constructive discharge under section

[8] Section 510, codified at 29 U.S.C. § 1140 states: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan. . . . It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given any information or has testified or is about to testify in any inquiry or proceeding relating to this chapter. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this action."

502 of ERISA.[9] See Donnelly v. AETNA Life Insurance Co., 465 F. Supp. 696 (E.D. Pa. 1979)(holding that a constructive discharge claim under section 502 requires evidence that the employer deliberately made an employee's working conditions intolerable thereby forcing him to quit). Therefore the allegations that defendants intentionally created an intolerable work environment in order to escape their duties to Welch under the 1997 Plan in the event of his involuntary termination state a claim. Such inquiries are necessarily fact intensive. In Joyce, while the court agreed with the court below that the defendant's action of requiring an employee to remain in his or her position cannot reasonably be considered an intolerable condition of employment it refused to create a bright line rule that that could never be the case. Id. at 177.

Welch makes a number of allegations that could support a claim of constructive discharge including: the chastisement he received from Van Dyck on March 24, 2000 and his subsequent demotion and reduction in pay; the threats from Van Dyck to reveal embarrassing information about Welch should he fail to comply with Van Dyck's demands; the retrieval of company property and his ejection from Maritrans' office on April 27, 2000; and the delay in returning his laptop computer, the change of his password and the denial of his personal files upon his return to work on April 30, 2000. In ruling on defendants motion I must determine if a jury could ultimately decide that a reasonable person would be forced to quit under these circumstances. Considering the allegations in the light most favorable to plaintiff, I find he has plead a cause of action for constructive discharge under sections 510 and 502 of ERISA. However, since these

[9] Section 502, codified at 29 U.S.C. § 1132(a)(1)(B) states: "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

claims are wholly incorporated under plaintiff's allegations in Counts IV and V, Count II is redundant and will be dismissed.

C. Count III - March, 2000 Agreement

Count III of the amended complaint accuses defendants of violating a severance agreement reached between the parties in March, 2000. The complaint alleges a "breach of employment contract" against Maritrans but does not state whether this claim is based on federal or state law. I note that under well settled law the exclusive remedy for a denial of benefits allegedly due under an ERISA plan is an action pursuant to section 502 of ERISA, 29 U.S.C. § 502(a)(1)(B), and any state law claims based on the same cause of action are preempted by section 514, 29 U.S.C. § 1144(a). See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48, 52-56 (1987). The issue before me in Count III, however, is whether the amended complaint alleges enough facts to lead a reasonable juror to believe that a severance agreement was reached in March, 2000. If such an agreement is found to exist Welch would be prohibited from seeking state law remedies to enforce it and would be bound by section 502 of ERISA.

Welch maintains that he was offered employment at Maritrans' Philadelphia office at a salary of $195,000 plus 8,000 shares of restricted stock and stock options, on March 17, 2000 [10] and defendants have refused to honor that contract. Defendants respond that according to plaintiff's complaint he was asked not to sign the written agreement forwarded by Smallacombe

[10] Count III of the amended complaint refers to a contract "dated March 27, 2000." (Pl. Am. Comp. at ¶ 46). In light of assertions appearing earlier in the amended complaint, id. at ¶ 16, and subsequent pleadings, (Pl.'s Opp. to Def.'s Mot. to Dism. at 8), the proper date of this alleged contract appears to be March 17, 2000.

on March 21 because she had no authority to make such an offer. Therefore defendants maintain that any such offer was revoked before it was accepted. (Def.'s Mot. to Dism. at 9). Welch disagrees claiming "[o]n or about March 17, 2000 Welch received a telephone call from Smallacombe concerning the offers of employment made to him. Welch accepted the offer to remain in Philadelphia, and offered to waive his entitlement to relocation costs. . . ." (Pl.'s Comp. at ¶16). Plaintiff asserts the letter received on March 21 merely documented terms that had been orally agreed to and accepted by him on March 17.

In order to survive a 12(b)(6) motion, the plaintiff must allege only enough facts to support his claim and does not need to demonstrate that he will ultimately prevail on the merits. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). With respect to the existence of a severance agreement in March, 2000, plaintiff's allegations are sufficient under ERISA.

D. Count IV - Claims To Recover Benefits Under Section 502 of ERISA

1. 1997 Plan

In Count IV plaintiff seeks to enforce the terms of the 1997 Plan under section 502 of ERISA, [11] claiming he is entitled to recover benefits under that agreement following his involuntary termination. Defendants respond that Welch voluntarily quit his job and therefore under the plain language of the 1997 Plan is not entitled to severance. [12] Clearly there exists a fundamental disagreement between the parties that lies at the core of this dispute. Describing Welch's case defendants state, "[c]reative pleading aside, [p]laintiff's claims grow out of his

[11] See supra n.9.

[12] See supra n.7.

assertion that he was entitled to severance benefits. . . notwithstanding his voluntary resignation." (Rep. Mem. in Supp. of Def.'s Mot. to Dis. at 1). By contrast, Welch states, "[t]he core allegations of [p]laintiff's [c]omplaint are that [d]efendants did in fact involuntarily discharge [p]laintiff. . . ." (Pl.'s Opp. to Def.'s Mot. to Dism. at 9). Welch claims that he was either actually or constructively [13] discharged and in support of his allegations he avers in his complaint: he was demoted; his salary was reduced; he was escorted from the building; his files were seized; his laptop was temporarily confiscated; and his work was significantly altered. At this stage of litigation, the court may not dismiss a claim unless plaintiff clearly is unable to demonstrate that he is entitled to relief. See Jenkins v. McKeithen, 395 U.S. 411 (1969). Reviewing the amended complaint in the light most favorable to Welch I find it is possible that plaintiff could produce evidence sufficient to prove that he was involuntarily discharged from Maritrans. Therefore, defendants' motion to dismiss plaintiffs claim for recovery under the 1997 Plan pursuant to 29 U.S.C. § 1132 will be denied.

2. Standard Plan

In Count IV plaintiff also claim he is entitled to benefits under the Standard Plan. Defendant moves to dismiss on the basis that plaintiff is not entitled to those benefits since he missed the September 22, 1999 cutoff date by which employees had to notify Maritrans of their decision to accept the plan and, alternatively, plaintiff failed to exhaust his internal plan remedies as required under ERISA. In response, plaintiff states that the first time he was offered the

[13] As I determined in ruling on defendants' motion concerning Count II of the amended complaint, a cause of action alleging constructive discharge may be brought under section 502 of the ERISA statute.

Standard Plan was on April 7, 2000, (Pl.'s Am. Comp. at ¶ 22), and he was therefore not subject to the cutoff. However, plaintiff also states that on April 28, 2000 he received a letter stating that Maritrans did not intend to pay him a severance, id. at ¶30, and nowhere in his complaint or subsequent filings does he allege that he accepted the terms of the Standard Plan prior to this revocation. As Welch does not allege he was ever a participant in or beneficiary of the Standard Plan under section 29 U.S.C. § 1132, defendants' motion to dismiss Count IV with respect to the Standard Plan is granted. Having granted defendants' motion I need not determine whether or not he failed to exhaust his administrative remedies under the Standard Plan. Any claim that Welch might have that the revocation of the Standard Plan was in violation of federal employment laws will be addressed below. [14]

E. Count V - Claims for Interference With Protected Rights Under Section 510 of ERISA

1. 1997 Plan

To make out a prima facie claim under section 510, plaintiff must demonstrate: (1) prohibited employer conduct; (2) taken for the purposes of interfering; (3) with the attainment of any right to which the employee may become entitled. Blain v. Bell Atlantic of Pa., 42 F. Supp. 2d 527, 532 (E.D. Pa. 1999). "To recover under section 510, the employee must show that the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits." Dewitt v. Penn-Del Directory, 106 F.3d 514, 522 (3d Cir. 1997). "Congress enacted section 510 primarily to prevent employers from discharging or

[14] See infra section F.

harassing their employees in order to keep them from obtaining ERISA-protected benefits." Kowalski v L&F Products, 82 F 2d. 1283, 1286 (3d Cir. 1996). As stated above, plaintiffs may bring claims under section 510 claiming constructive discharge. [15] There are enough allegations that defendants took specific action in order to induce Welch to quit his job, thereby releasing defendants from their obligations under the 1997 Plan, to overcome defendants' motion. With respect to the 1997 Plan defendants' motion to dismiss Count V will be denied.

2. Standard Plan

In Count V plaintiff also claims defendants interfered with Welch's protected rights under the Standard Plan in violation of section 510 of ERISA. Section 510 renders it unlawful "for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled. . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled. . . ." 29 U.S.C. § 1140. As stated above, plaintiff does not allege in his amended complaint that he was ever a "participant" or "beneficiary" of the Standard Plan. Once it became clear that Maritrans was not going to allow plaintiff to remain in Philadelphia plaintiff states that "for several weeks, the parties worked to reach an agreement as to the prospects of Welch's continued employment with the company or suitable severance." (Pl.'s Am. Comp. at ¶ 22). Among the offers proposed was granting Welch severance under the terms of the Standard Plan. Id. Plaintiff does not allege that he accepted this offer. Plaintiff's allegation in subsequent filings that he believes "several employees not designated as qualifying under the [Standard] Plan have recently departed with a

[15] See supra section C.

severance package in hand" does not advance his claim that defendants interfered with his rights in violation of section 510 of ERISA. (Pl.'s Sur. Rep. at 4). Welch was neither a participant nor beneficiary of the Standard Plan under section 29 U.S.C. § 1140, and therefore he may not bring an action against defendants for interfering with his rights under that plan. Accordingly, defendants' motion to dismiss Count V will be granted with respect to the Standard Plan.

F. Count VI - Retaliation

Plaintiff's final claim is one for retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 626. To establish a prima facie claim of retaliation plaintiff must allege: (1) he engaged in protected conduct; (2) he was subject to an adverse employment action subsequent to such activity; and (3) a causal link between the protected activity and the adverse action. See Barber v. CSX Distrib. Serv., 68 F.3d 694, 701 (3d Cir. 1995). While plaintiff does not need to prove the merits of the underlying discrimination complaint, he must show that he had a reasonable belief that the conduct about which he complained was unlawful. Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865 (3d Cir. 1990). Defendants' 12(b)(6) motion will be granted if plaintiff's amended complaint does not allege the existence of each of the above three elements.

On April 25, 2000 Smallacombe sent Welch draft copies of an offer of severance from Maritrans. The documents contained a waiver agreement releasing Maritrans from all claims including any brought under federal age discrimination laws. The documents also stated that Welch had twenty-one days to consult with counsel regarding the agreement. Welch subsequently forwarded these documents to his attorney. Plaintiff alleges that on April 26, 2000

plaintiff's counsel sent a letter to Van Dyck that "asserted Welch's rights under the Age Discrimination in Employment Act and other employment laws." (Pl.'s Am. Comp. at ¶ 27). Welch maintains that as a direct result of this communication Maritrans impermissibly retaliated against him by withdrawing all severance offers and constructively firing him. Id. at ¶ 31. Central to plaintiff's claim are the contents of the April 26 letter and defendants' reaction to it. The general rule is that "a district court ruling on a motion to dismiss may not consider matter extraneous to the pleadings." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). However, a "document integral to or explicitly relied upon in the complaint may be considered without converting [a] motion to dismiss into one for summary judgment." Id. at 1426. I find that the letter sent via e-mail from plaintiff's counsel to Van Dyck on April 26, 2000 is such a document. The April 26 letter refers to a demand by Maritrans not mentioned in the amended complaint that plaintiff must resign by April 30, 2000 or the pending offer of benefits would be revoked. This would allow Welch only five days to review the agreement. The only mention of federal employment laws contained in the April 26 letter is in connection with plaintiff's counsel's demand that Welch be given twenty-one days to examine the agreement. There is no suggestion of a possible ADEA claim. The "protected activity" that plaintiff alleges he engaged in must therefore be his right to consult an attorney and his right to examine any agreement including a waiver of ADEA claims for at least twenty-one days.

The class protected by the ADEA are workers over forty and when such an employee leaves his/her employment an employer will often to try to obtain a waiver of that worker's right to bring a suit under that statute. Such waivers are enforceable only if they comply with the Older Workers Benefits Protection Act, 29 U.S.C. § 626(f), a 1991 amendment to the ADEA,

which provides safeguards for older workers who are offered settlements or packages that include a waiver of their rights to bring claims under the ADEA. Among these safeguards are the requirements that the employee be allowed to consult with an attorney and be given a period of at least twenty-one days within which to consider the agreement. [16] 29 U.S.C. § 626(f)(1)(E) (F)(i). The question before me is whether Welch's notification of Maritrans of his rights under the OWBPA constitutes a "protected activity" for the purposes of establishing a claim of retaliation under the ADEA. I hold that it does not. Violations of the OWBPA merely render any agreement entered into regarding an employee's waiver of liability invalid. This prevents employers from enforcing the waiver agreement and the employee may proceed to court with any legitimate ADEA claim he has against his emloyer. In Whitehead v. Oklahoma Gas & Electric Co., 187 F.3d 1184, 1191 (10th Cir. 1999), the court upheld the lower court's determination that the OWBPA does not, by itself, establish a claim under the ADEA stating, the "OWBPA simply

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[16] Under the OBWA, "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

A. the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual ...;
B. the waiver specifically refers to rights or claims arising under [the ADEA];
C. the individual does not waive rights or claims that may arise after the date the waiver is executed;
D. the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
E. the individual is advised in writing to consult with an attorney prior to executing the agreement;
F. (i) the individual is given a period of at least 21 days within which to consider the agreement; ...
G. the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired...." 29 U.S.C. § 629(f).

determines whether an employee has, as a matter of law, waived the right to bring a separate and distinct ADEA claim."

Plaintiff asserts that under the ADEA, 29 U.S.C. § 623(d), "an employer may not take retaliatory action for his assertion of federal rights under this act." (Pl.'s Opp. to Def.'s Mot. to Dism. Pl.'s Retal. Claim at 2). Section 623(d) makes it unlawful "for an employer to discriminate against any of his employees. . . because such individual. . . has opposed any practice made unlawful by this section. . . . 29 U.S.C. § 623(d). Arguably this might include violations of the waiver provisions of the OWBPA located in section 626. However, in Barber, 68 F.3d at 702, the Court of Appeals interpreted the word "section" in 623(d) to refer to section 623, thereby outlawing discrimination against employees opposing practices forbidden by 623(a). Section 623(a) prohibits an employer from refusing to hire, discharging, or discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's age." 29 U.S.C. § 623(a). "Thus, the statute provides that a person has engaged in 'protected conduct' when he or she opposes discrimination on the basis of age." Barber, 68 F.3d at 702. Were an attorney to notify an employer that his client was the victim of age discrimination and the employer took action that adversely effected the employee as a result, such activity would constitute "protected conduct." See Martin v. General Electric Co., 891 F. Supp. 1052, 1060 (E.D. Pa. 1995). However, neither Welch's amended complaint nor the April 26 letter alleges age discrimination by Maritrans. Accepting all Welch's allegations as true, the most defendants allegedly are guilty of is violating the waiver provisions of the OWBPA Such a violation does not give rise to a claim under the ADEA. See EEOC v. Sears, Roebuck & Co., 857 F. Supp. 1233 (N.D. Ill. 1994) (holding that an employee

had no claim under the ADEA even where an employer had conditioned the acceptance of a severance agreement on an invalid release). Plaintiff's actions did not constitute "protected conduct" under the ADEA. As Welch's amended complaint and the April 26 letter do not allege all the elements required to state a cause of action for retaliation under the ADEA, defendants' motion to dismiss Count VI will be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN E. WELCH	:	CIVIL ACTION
v.	:	
MARITRANS INC., et al.	:	NO. 00-2606

ORDER

AND NOW, this day of January, 2001, in consideration of defendants' motion to dismiss, plaintiff's response, subsequent supporting memoranda from both parties and for the reasons stated in the accompanying memorandum, it is ORDERED that:

1. Defendants' motion to dismiss Counts I, II, and VI of plaintiff's amended complaint is

GRANTED.

2. With respect to the existence of an offer allegedly accepted by plaintiff in March, 2000, defendants' motion to dismiss Count III of plaintiff's amended complaint is DENIED.

3. Defendants' motion to dismiss Counts IV and V of plaintiff's amended complaint is:

   a. DENIED with respect to plaintiff's claims concerning the 1997 Plan.

   b. GRANTED with respect to plaintiff's claims concerning the Standard Plan.

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THOMAS N. O'NEILL, JR., J.